Filed 8/1/02 Marr. of McGuire CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

| | |
|---|---|
| In re the Marriage of KENNETH R. and HALEY F. MCGUIRE. | B144802 |
| KENNETH R. MCGUIRE,<br><br>Appellant,<br><br>v.<br><br>HALEY F. MCGUIRE,<br><br>Appellant. | (Los Angeles County Super. Ct. No. LD006671) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Lester E. Olson, Temporary Judge.* Affirmed in part, reversed in part, and remanded in part with directions.

Fell, Marking, Abkin, Montgomery, Granet & Raney, Frederick W. Montgomery, Barry R. Pinnolis; and Edward J. Horowitz for Appellant Haley F. McGuire.

The Dolan Law Firm, Peter Brown Dolan; and Valerie H. Colb for Appellant Kenneth R. McGuire.

---

* Pursuant to article VI, section 21 of the California Constitution.

This appeal arises from an August 28, 2000, judgment settling the marital estate of Kenneth R. (Ken) and Haley F. McGuire (Haley). Six issues lie at the heart of Haley's appeal: (1) whether the trial court erred in finding that there was no enforceable property settlement agreement; (2) whether the trial court erred in allowing Ken a 70 percent separate property carve-out; (3) whether the trial court erred in terminating the 707 Partnership, forfeiting Haley's investment in it, and permitting Ken to create a new business venture owned solely by him; (4) whether Ken breached his fiduciary duties to Haley with regard to the 707 Partnership and the Burbank Companies; (5) whether the trial court failed to comply with Family Code section 2550[1] and whether it inconsistently considered the parties' tax consequences; and (6) whether the trial court's denial of child and spousal support was erroneous. Ken filed a cross-appeal, asserting that the trial court erred (1) in determining that he was estopped from receiving reimbursement for monies he overpaid to Haley while these proceedings were pending because he delayed in seeking a division of the community property, and (2) in denying his request for attorney fees and costs under section 271. He also challenges the trial court's award of only six percent interest on the money judgment in his favor and against Haley.

We find that the trial court erred in terminating the 707 Partnership without winding up the partnership business, including valuing the community contribution to the 707 Partnership, and we remand for further proceedings on that issue. We also find that the proper award of interest on Ken's judgment should have been 10 percent, and we reverse on that issue. In all other respects, we find that the trial court did not commit any reversible error, and we affirm.

## FACTUAL BACKGROUND

Ken and Haley[2] married on February 14, 1981, and had three children, one of whom was 22 years old at the time of trial, one of whom was 18 years old at the time of

---

[1] All further statutory references are to the Family Code unless otherwise indicated.

[2] For convenience, we refer to the parties by their first names. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475, fn. 1.)

trial, and one of whom was 16 years old at the time of trial. Haley also had a son from a prior marriage, who was 27 years old at the time of trial.

Both during and after their marriage, Ken and Haley formed seven subchapter-S corporations, the Burbank Companies, to develop and produce hushkits[3] and their component parts. Two of the Burbank Companies are particularly relevant to the issues raised on appeal: Burbank Aeronautical Corporation II (BAC II) and Burbank Nacelle Corporation (BNC). Ken and Haley formed BNC to hold their interest in the ABS partnership, a separate hushkit enterprise in which Ken and Haley invested.

In late 1994 (after the stipulated date of separation), Ken began research and development on a hushkit for the 707 aircraft. In June 1995, he asked Haley if she would participate in this "707 Partnership,"[4] also known as the Original Hushkit Venture, with a portion of her 50 percent share of the then-increasing Burbank Companies' profits. Haley agreed to Ken's proposal. As set forth in the procedural background, *infra*, the trial court ultimately found that the parties had thus entered into an enforceable partnership agreement, the 707 Partnership, one term of which was that Haley agreed to permit the use of funds received from distributions from ABS to fund the operational and research and developments costs with respect to the Original Hushkit Venture.

## PROCEDURAL BACKGROUND

I. *Dissolution Proceedings*

On July 15, 1992, Ken filed his in propria persona petition for dissolution (the petition).[5] The petition provides, in relevant part, that a "property settlement agreement

---

[3] Hushkits are noise suppression assemblies which are applied to the engines of older jet aircrafts to meet United States and European noise reduction standards.

[4] The parties freely interchange "707 Partnership" with "Original Hushkit Venture." The 707 Partnership was formed to engage in the Original Hushkit Venture.

[5] Ken and Haley stipulated that their date of separation was July 15, 1992.

[was] being negotiated." On August 12, 1993, Haley filed an in propria persona response and request for dissolution of marriage (the response). In her response, Haley declared, under penalty of perjury, that "[a] property settlement agreement is being negotiated between" the parties.

On October 14, 1993, the trial court held a mandatory settlement conference, at which time the request for bifurcation and termination of the marital status was granted. Neither party was represented by counsel. As is relevant to this appeal, Ken stated at that hearing that the parties "agreed it's community property. Everything will be 50/50." Recognizing that no agreement had been reached, Commissioner Mina Fried urged Haley to obtain independent counsel to review any marital settlement agreement before executing it.

Thereafter, Haley and Ken stipulated to 13 continuances of the mandatory settlement conference, until the matter ultimately was taken off calendar by the court on February 16, 1996.

In October 1994, Haley retained counsel to represent her in the dissolution proceeding and to establish a trust. Despite having retained counsel, no activity was taken in connection with the dissolution proceedings.

In 1998, the parties' feud began to intensify. In May 1998, Ken filed an ex parte application and request for an order to show cause, seeking (1) to compel Haley to sign an agreement and pledge her stock and other assets for a $5 million line of credit for use in the 707 Partnership, and (2) to provide Ken with total operating control over the Burbank Companies under section 1100, subdivision (d), and expressly claiming, for the first time, that the community had never been divided.

Proceedings in May and June 1998 resulted in several stipulations and orders, including, inter alia: (1) Haley agreed to the $5 million line of credit and to pledge her 50 percent stock and other assets, subject to Ken providing relevant financial information and loan documents; (2) Ken had the right to manage the Burbank Companies, subject to the will of the board of directors, which consisted solely of Ken and Haley; and

(3) retired Judge Lester E. Olson was appointed as judge pro tem to decide all issues necessary for a complete resolution of these proceedings.

On October 29, 1998, Haley filed an order to show cause for child support and attorney fees, at which time she requested that Ken pay both retroactive child support and reimbursement for expenses for her adult son of her prior marriage as well as for the parties' three children.

On April 15, 1999, the trial court held a hearing on issues regarding the 707 Partnership. At that hearing, Haley's counsel expressly stated that Haley wanted to stop contributing to the 707 Partnership with her share of ABS distributions. In written briefs filed thereafter, Haley changed her mind and stated that she did want to participate in the 707 Partnership, but simply wanted to use funds from BAC II, not from ABS, to fund the Original Hushkit Venture.

On May 10, 1999, the trial court issued an order scheduling the trial, to be conducted in four phases.

On August 11-13, 1999, the trial court conducted phase one of the trial. In an order dated August 16, 1999, the trial court found "that the parties did not enter into any enforceable agreement, either oral or written," dividing the ownership of the stock of the Burbank Companies, including BNC's 37 and one-half percent ownership interest in ABS. The trial court also found that Ken was not estopped from denying the existence of such an agreement.

On September 8-9, 1999, October 25-28, 1999, and November 1-3, 1999, phase two of the proceedings was held on issues including Ken's "separate property carve-out" claim, valuation of community assets, and valuation of the 707 Partnership assets used by New Hushkit Venture. Thereafter, on November 15-18, 1999, phase three of the proceedings was conducted. The trial court considered the following issues: whether Ken breached his fiduciary duties to Haley in managing the Burbank Companies and the 707 Partnership, and the immediate and specific tax consequences relating to the division of assets.

In a tentative decision dated December 6, 1999, the trial court found, in relevant part, that Haley had terminated the oral partnership agreement regarding the Original Hushkit Venture and allowed Ken to create and operate a New Hushkit Venture. In doing so, however, the trial court "warned [Ken] that the burden will be upon him to adequately account for the operations of the New Hushkit Venture, having in mind that his use of the tangible and intangible assets of the Old Hushkit Venture will be the same as a fiduciary and as a remaining partner 'in possession' in the winding up and dissolution of a partnership."

On March 20-23, 2000, the trial court held phase four of the proceedings. Phase four addressed support and attorney fees. Tentative decisions were issued on April 3 and 17, 2000, denying Haley's request for child and spousal support and Ken's request for attorney fees pursuant to section 271.

After lengthy proceedings regarding the final statement of decision, the trial court filed its statement of decision and a proposed further judgment on reserved issues on July 6, 2000.

On August 28, 2000, after further proceedings, including Haley's objections, the trial court signed and filed: (1) an order making various revisions to the July 6, 2000, statement of decision; (2) a revised, final 96-page statement of decision; (3) a 24-page further judgment on reserved issues; and (4) a notice of entry of judgment. The trial court concluded, in pertinent part: (1) the parties never entered into an enforceable property settlement agreement, (2) Ken was entitled to a 70 percent separate property carve-out for the increased value and earnings of the Burbank Companies between the date of separation and a date close to trial, (3) the 707 Partnership was terminated and Ken was entitled to create a New Hushkit Venture, (4) Ken breached no fiduciary duties to Haley, and (5) Haley was not entitled to child or spousal support. The trial court also found that Ken was estopped from seeking reimbursement from Haley for distributions he overpaid her while these proceedings were pending. No attorney fees and costs were ordered pursuant to section 271.

II. *The Parties' Appeals*

On September 25, 2000, Haley timely filed a notice of appeal from the further judgment, pursuant to Code of Civil Procedure section 904.1. On October 26, 2000, Ken timely filed his notice of cross-appeal.

## DISCUSSION

***Haley's Appeal***

I. *The Trial Court Properly Found That the Parties Did Not Enter Into an Enforceable Settlement Agreement*

A. *Standard of Review*

The parties dispute the appropriate standard of review. Haley contends that we should review this issue de novo because the underlying facts are undisputed. In contrast, Ken contends that we should review the trial court's findings for substantial evidence. We agree with Ken. Because the underlying facts were hotly contested, the standard of review is the familiar substantial evidence rule.

Questions of law and the application of law to undisputed facts are subject to de novo review on appeal. (*Stratton v. First Nat. Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1083; *Schwartzman v. Wilshinsky* (1996) 50 Cal.App.4th 619, 626.)

On the other hand, we consider the evidence in the light most favorable to the trial court's determination and resolve all evidentiary conflicts in favor of the judgment. We do not reweigh the evidence, which is a function exclusively within the province of the trier of fact. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) Furthermore, "[w]here [a] statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358; see also *Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1317, fn. 4 [quoting *Bowers v. Bernards* (1984) 150 Cal.App.3d

870, 874 and stating "when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court"].)

"It is settled that appellate review of the sufficiency of the evidence is governed by the substantial evidence rule. [Citation.] This court views the entire record in the light most favorable to the prevailing party to determine whether there is substantial evidence to support the trial court's findings. [Citations.]" (*In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, 931 (*Duffy*).) "'"In reviewing the evidence on . . . appeal all conflicts must be resolved in favor of the [prevailing party], and all legitimate and reasonable inferences indulged in [order] to uphold the [finding] if possible."' [Citation.]" (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 31.) In that regard, it is well-established that the trial court is the judge of credibility. (*People v. French* (1978) 77 Cal.App.3d 511, 523 [holding that the appellate court does not reassess credibility of witnesses].) The trial court weighs the evidence and determines issues of credibility and these determinations and assessments are binding and conclusive on the appellate court. (*In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 160.)

Stated differently, the applicable standard of review is as follows: "In resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment [citation]. All issues of credibility are likewise within the province of the trier of fact. [Citation.] 'In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing*.' [Citation.] All conflicts, therefore, must be resolved in favor of the respondent. [Citation.]" (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926, italics omitted; accord, *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) This court is without power to: judge the effect or value of the evidence; weigh it; consider the credibility of witnesses; or resolve testimonial or evidentiary conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. (*Leff v. Gunter* (1983)

33 Cal.3d 508, 518; *Overton v. Vita-Food Corp.* (1949) 94 Cal.App.2d 367, 370, disapproved on another point in *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866, fn. 2.)

With these principles in mind, we find sufficient evidence to support the trial court's conclusion that the parties did not enter into an enforceable property settlement agreement.

B. *Substantial Evidence Supports the Trial Court's Finding That the Parties Did Not Enter into an Enforceable Settlement Agreement*

As set forth in the thorough and well-reasoned trial court statement of decision, there is ample evidence which supports the trial court's conclusion that the parties had not entered into an enforceable settlement agreement.[6] Ken testified at trial that the parties never reached an agreement to divide the marital estate. The testimony of a single witness, even a party, is sufficient to support a judgment. (*Horn v. Oh* (1983) 147 Cal.App.3d 1094, 1098-1099.)

Most damaging to her appeal is Haley's admission at trial that no written settlement agreement had been reached. The only written agreement which existed was the conciliation court agreement, which apparently did not address division of the marital estate. And, to the extent Haley testified that a written agreement dividing the marital estate may have existed, no such document ever materialized and the trial court was free to disregard Haley's not credible testimony, an assessment the trial court repeatedly noted in its statement of decision. (*In re Marriage of Dick*, *supra*, 15 Cal.App.4th at p. 160.)

---

**6** An appellate court need not summarize all the evidence, but instead it must "only determine that there is substantial evidence to support the trial court's order, to affirm it. [Citation.] Accordingly, [the reviewing court may] follow the trial court's example and recount only that evidence which was cited by the court in support of its specific factual findings." (*In re Marriage of Dick*, *supra*, 15 Cal.App.4th at p. 160.) As set forth herein, we find that there is substantial evidence to support the trial court's order. Thus, we limit our citation in large part to that evidence cited by the trial court in its statement of decision.

Moreover, there was sufficient evidence that the parties always believed that they each owned 50 percent of the Burbank Companies and that that status did not change over the years while the dissolution proceedings were pending; no new agreement to divide the property into the parties' respective separate properties ever was reached. For example, Haley testified at trial that her ownership interest in the Burbank Companies never changed; she always owned 50 percent. The stock certificates issued for the Burbank Companies confirmed the parties' mutual generalized understanding that each had a 50 percent interest in the Burbank Companies. As Haley testified, as early as 1987, she and Ken received equal shares of stock in the Burbank Companies. Even the June 27, 1996, letter from Homer G. Sheffield, Jr. (Sheffield), Haley's attorney, to Ken confirms that the parties' agreement to own the Burbank Companies' stock equally had always been their mutual understanding. No new agreements were reached.

Likewise, the March 29, 1994, letter to Diane Muench, the seller of the Santa Barbara house Haley ultimately purchased, by Ken and Haley reiterates the parties' mutual understanding of 50-50 ownership of the Burbank Companies; it says nothing about the ownership being the parties' separate property and is not evidence of an agreement to divide the community property into separate property. Even the personal financial statement attached to the letter confirms Haley's position with the Burbank Companies as a 50 percent owner. The two-letter bank code ("SO") reflects her understanding that she owned that property as a single owner. Although the "single ownership" category is listed within the "separate property" heading there is no reason for us to believe that the parties intended this document to evidence an agreement to divide the marital estate, particularly in light of the overwhelming evidence that no such agreement ever was formed.

Moreover, nothing in the April 30, 1998, letter from Ken's attorney, Joseph L. Cole, to Haley's attorney evidences an agreement to divide the marital property. The fact that Haley was receiving "enormous distributions" does not demonstrate her separate interest in the Burbank Companies. Given the multi-million dollar value of the Burbank

Companies over the years, the parties always received "enormous distributions" without ever characterizing or intending them to be separate property.

Further, various agreements entered into by the parties between the stipulated date of their separation and the trial of phase one in this case do not support Haley's contention that the parties reached a final property settlement agreement. Substantial evidence supports the trial court's conclusion that the June 1995 oral agreement between the parties concerned only the pursuit of a corporate opportunity by BAC II, not an enforceable division of community interest in BAC II. Likewise, the February 7, 1997, letter from Sheffield to Ken does not address the division of community interest; it merely discusses the parties' prior oral agreement regarding the 707 Partnership.

Haley argues that the 707 Partnership agreement could not have been a valid agreement unless Haley's multi-million dollar investment in it had been her separate property. We disagree. The fact that Haley was contributing her ABS distributions to the 707 Partnership does not compel the conclusion that she was contributing "separate" property. Rather, she and Ken simply agreed to contribute their shares of the community property to the 707 Partnership.

Haley places much emphasis on the various drafts of settlement agreements which circulated between the parties and counsel. However, as the trial court correctly noted, there is no evidence whatsoever of any signed agreement; there only are drafts. Even Haley's attorneys recognized that the writings only were drafts when they requested further information from Ken regarding the "proposed" settlement agreement he was drafting. And, to the extent that those drafts demonstrate anything, they evidence Ken's state of mind, namely that the property was community property which had not yet been divided. The drafts never refer to the property as "separate property."

The lower court record in this matter is in accord and confirms that the parties never reached a final settlement agreement. Ken's petition provides, in relevant part, that a property settlement was being negotiated. Likewise, in Haley's response to Ken's

petition,[7] she declared, under penalty of perjury, "[a] property settlement agreement is being negotiated between this Respondent and the Petitioner." As the trial court noted in the statement of decision, the only statements made in open court by the parties were at the mandatory settlement conference on October 14, 1993, at which time no oral stipulation regarding the division of community property assets was reached. In fact, the trial court urged Haley to retain counsel before entering into a final settlement agreement. Surely the trial court would not have issued such a cautionary statement if the parties had already entered into a property settlement. And, as noted above, the only agreement reached by the parties was the conciliation court agreement, which was limited to child custody and visitation issues. It did not address the nature of the parties' interest in the Burbank Companies.

C. *The Trial Court Properly Applied Section 2550*

Haley contends the trial court erroneously applied section 2550. We disagree. Section 2550 provides, in relevant part, "[e]xcept upon the written agreement of the parties, or on oral stipulation of the parties in open court, or as otherwise provided in this division, in a proceeding for dissolution of marriage . . . the court shall, either in its judgment of dissolution of the marriage . . . or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally." Based upon the evidence discussed above, Haley contends that the parties entered into an enforceable written agreement to divide the marital estate into two equal separate parts. Her argument is not persuasive.

There is substantial evidence to support the trial court's conclusion that the parties never entered into a written agreement which satisfies section 2550 to divide the community property into equal separate shares. As discussed above, the evidence upon which Haley relies merely confirms what had always been the parties' agreement for

---

[7] The parties dispute who prepared Haley's response. This dispute is irrelevant because the document provides that a settlement agreement is "being negotiated," evidence that no final agreement had been reached.

community ownership. As such, the parties' ownership of the Burbank Companies remained to be divided, equally, pursuant to section 2550, and subject to Ken's right to assert a separate property carve-out.

Haley's heavy reliance upon *Estate of MacDonald* (1990) 51 Cal.3d 262 (*MacDonald*) and like cases[8] is misguided because there is no statute of frauds defense at issue herein. In *MacDonald*, the Supreme Court was called upon to interpret Civil Code section 5110.730, subdivision (a), the predecessor to section 852. (*MacDonald, supra*, at p. 268.) In doing so, it "fashion[ed] a test by which courts may judge the adequacy of particular writings for section 5110.730 (a) purposes." (*Id*. at p. 270, fn. omitted.) The Supreme Court concluded "that a writing signed by the adversely affected spouse is not an 'express declaration' for the purposes of section 5110.730 (a) *unless* it contains language which expressly states that the characterization or ownership of the property is being changed." (*Id*. at p. 272.) While the Supreme Court did consider the effect of Civil Code section 5110.730 on transmutations, it said nothing of section 2550 or agreements which meet the requirements of section 2550. In other words, there is nothing in *MacDonald* to support Haley's theory that the evidence herein undeniably establishes that the parties entered into an enforceable written agreement to divide the marital estate. Rather, we find that there is substantial evidence to support the trial court's decision that

---

**8** In her opening brief, Haley cites the following cases in support of her contention that she and Ken entered into a valid written agreement to divide the marital estate which satisfies the requirements of the statute of frauds: *Hall v. Hall* (1990) 222 Cal.App.3d 578; *In re Marriage of Maricle* (1990) 220 Cal.App.3d 55; *In re Marriage of Cream* (1993) 13 Cal.App.4th 81; and *Ayoob v. Ayoob* (1946) 74 Cal.App.2d 236, 242-243. As discussed herein, this argument and these cases are irrelevant because the statute of frauds is not at issue. The trial court did not find that the writings were inadequate to satisfy the statute of frauds and thus invalidated the contract on that ground. Rather, the trial court found that there was no express declaration by Ken to divide the marital estate into two separate, equal parts, as required by section 852, subdivision (a), (a finding unchallenged on this appeal) and concluded that the writings simply confirmed the parties' prior agreement to hold the property (ownership in the Burbank Companies) as community property. Thus, the statute of frauds is irrelevant; no new agreement (written or otherwise) was reached.

the parties continued operating under the terms of what had always been their agreement -- to hold ownership of the Burbank Companies jointly.

In a footnote, Haley contends that pursuant to section 2550, the parties to a marital dissolution proceeding may not keep their property as community property and, therefore, she and Ken necessarily owned their marital property jointly as separate property. This argument is nonsensical. Section 2550 provides that if the parties to a dissolution proceeding have not entered into an agreement regarding the distribution of the marital property, then the court must do so in its judgment of dissolution. There is no indication in the statute that community property magically transforms itself into two separate properties once a petition for dissolution has been filed. Rather, community property remains community property, which needs to be divided, either by the parties or the court. If the court divides the community property, it does so "equally" and equitably (such as by employing the concepts espoused in *In re Marriage of Imperato* (1975) 45 Cal.App.3d 432 (*Imperato*)). (§ 2550; *In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 625 (*Duncan*).) To hold otherwise would obviate the need for any of the statutory and common law tools for dividing the marital estate; it automatically would divide into the parties' separate property. Quite obviously, this is not the law.

Likewise, the fact that an "in-kind" division of community property is permissible (*In re Marriage of Cream*, *supra*, 13 Cal.App.4th at p. 94) does not compel the conclusion that one was required. (*In re Marriage of House* (1980) 106 Cal.App.3d 434, 440.) There is substantial evidence, as set forth above, to support the trial court's determination that the stock certificates confirmed the parties' generalized understanding and were not evidence of a new agreement.

D. *The Trial Court Properly Determined That the Parties Had Not Executed an Oral Agreement Dividing Their Property*

In her opening brief, Haley argues that the parties performed their oral agreement to own the Burbank Companies' stock on a 50-50 basis. For the reasons discussed in section I.B., *ante*, of this opinion, we reject this argument. Put simply, the evidence upon

which Haley relies merely reconfirms the parties' prior agreement for community property ownership of the Burbank Companies, an agreement which existed from as early as 1987. There was no new agreement, oral or written, to divide the estate into two equal and separate portions.

E. *The Trial Court Properly Determined That Haley Did Not Prove Estoppel*

In her opening brief, Haley relies upon the evidence discussed in section I.B., *ante*, of this opinion and argues that Ken is estopped from denying the existence of an enforceable marital agreement dividing the stock in the Burbank Companies. We disagree.

"The defense of equitable estoppel is established by showing: '(1) the party to be estopped [knew] the facts; (2) [the party intended] that his conduct [would] be acted upon; (3) the other party [was] ignorant of the true facts; and (4) [the other party relied] upon the conduct to his injury. [Citation.] . . . Where one of the elements is missing there can be no estoppel [citations].' [Citation.]" (*Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 47; see also Evid. Code, § 623; *Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1268; 11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, §§ 176-177, pp. 857-860.)

As discussed above, there was substantial evidence to support the trial court's finding that Haley and Ken had not entered into an enforceable marital settlement agreement. For the same reasons, Haley's estoppel argument fails. There is no evidence that Ken intended that Haley and others, including Diane Muench, rely upon any written representation that he and Haley owned stock in the Burbank Companies as their respective separate properties. Moreover, as discussed above, there is no evidence of any writing which evidences his intent to divide the stock into their respective separate properties. To the contrary, the writings all confirm the parties' prior consistent understanding of joint ownership of property which had not been divided.

Likewise, as the trial court expressly found, there was no evidence that anyone, including Haley and Diane Muench, had relied upon any alleged written representation that stock was owned by the parties separately. Haley's testimony that Diane Muench relied upon a representation that the parties owned the Burbank Companies stock as separate property is speculative and lacks foundation. To the extent Haley testified that she relied upon her belief that she owned 50 percent of the Burbank Companies as her separate property in purchasing various portions of real estate, she admittedly has not suffered a loss as a result of those purchases in that they have increased in value.

Haley places much emphasis on the fact that the trial court specifically found that Ken was estopped from seeking reimbursement for monies he overpaid to Haley during the six years their divorce was pending.[9] Her attempt to broaden the scope of the limited estoppel the trial court found is misguided. While Ken may be estopped from requiring Haley to reimburse him for distributions he erroneously overpaid to Haley because he delayed in pursuing and resolving these dissolution proceedings, that does not compel the conclusion that Ken is estopped from arguing that the marital property was not divided. Rather, as discussed above, there is substantial evidence to support the trial court's decision that the marital estate never had been divided. The evidence merely confirms the parties' lack of agreement to divide the community property; it does not amount to an estoppel. Likewise, as set forth above, there is no evidence that anyone, including Haley, relied upon any representation of Ken that the marital property had been divided.

Haley's reliance upon *Hall v. Hall*, *supra*, 222 Cal.App.3d at page 578 in support of her estoppel argument is misplaced because, as set forth herein, the statute of frauds is not at issue and there is no evidence of reliance upon Ken's alleged representation that the property had been divided.

---

**9** Ken filed a cross-appeal, challenging the trial court's finding of estoppel on this issue. We separately address his cross-appeal, *infra*.

F. *The Doctrine of Judicial Admissions Is Inapplicable*

A "judicial admission is not merely evidence of a fact; it is a conclusive concession of the truth of a matter and has the effect of removing it from the issues." (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 97, p. 799.) Haley's evidence in support of this argument consists of (1) Ken's statement in the petition that an agreement was being negotiated, and (2) his statement at the October 14, 1993, mandatory settlement conference that the parties had agreed to divide the property equally. This evidence, however, is insufficient to warrant reversal of the trial court's findings.

First, Ken's statement in the petition that an agreement was being negotiated means nothing more than just that -- an agreement was being negotiated. As set forth above, there is ample evidence to support the trial court's conclusion that no final agreement was reached. The fact that an agreement was being negotiated is not a judicial admission that one had been reached.

Second, Ken's statement in court on October 14, 1993, does not constitute a judicial admission. Ken informed the lower court that the parties "agreed it's community property. Everything will be 50/50." This statement is consistent with the trial court's finding that while these proceedings were pending, the parties continued to operate under what had always been their agreement -- to maintain their ownership in the Burbank Companies as community property, which needed to be divided by the trial court at the conclusion of these proceedings. Substantial evidence supports the trial court's finding that the transcript indicates that the parties had not yet entered into a property settlement agreement.

II. *The Trial Court Properly Allowed Ken a 70 Percent Separate Property Carve-out*

Having found that no enforceable agreement was reached between the parties to divide the marital estate, the trial court then properly divided the marital estate pursuant to section 2550, subject to a separate property carve-out, if any. We find the trial court properly allowed Ken a 70 percent separate property carve-out.

A. *Standard of Review*

As noted above, section 2550 requires the court to "divide the community estate of the parties equally." Generally speaking, "the court shall value the assets and liabilities as near as practicable to the time of trial." (§ 2552, subd. (a).) However, "[w]hen a spouse operates a community property business after separation, there is an inherent tension between the general rule that the business must be valued as of the date of trial (former Civ. Code, § 4800, subd. (a), now § 2552, subd. (a)) and the rule that a spouse's earnings after separation are his or her separate property. (Former Civ. Code, § 5118, now § 771, subd. (a); see *In re Marriage of Green* (1989) 213 Cal.App.3d 14, 20.)" (*Duncan, supra*, 90 Cal.App.4th at p. 624.) To ameliorate the effect of a trial date valuation, the trial court may "equitably apportion a spouse's postseparation efforts between community and separate interests. [Citation.]" (*Id*. at pp. 624-625; see also *Imperato, supra*, 45 Cal.App.3d at p. 436.) This tool, like the 1976 amendment to section 2552, subdivision (b) (former Civil Code section 4800), "was designed to remedy certain inequities such as 'when the hard work and actions of one spouse *alone* and after separation . . . greatly increases the "community" estate which must then be divided with the other spouse.' (*In re Marriage of Barnert* (1978) 85 Cal.App.3d 413, 423.)" (*Duncan, supra*, at p. 625.) In other words, "[i]f the [separate] earnings of a spouse [after separation] in some manner increase the value of a community asset, the court must then determine what portion of the asset is community property and what portion is separate property." (*Imperato, supra*, 45 Cal.App.3d at p. 436.)

"Where, as here, the trial court is vested with discretionary powers, we review its ruling for an abuse of discretion. [Citation.] As long as the court exercised its discretion along legal lines, its decision will be affirmed on appeal if there is substantial evidence to support it." (*Duncan, supra*, 90 Cal.App.4th at p. 625.)**[10]**

---

**10** As in *Duncan, supra*, 90 Cal.App.4th at page 625, footnote 5, Haley "urges us to apply an independent review standard, arguing the court's ruling . . . applied to undisputed facts." However, as in *Duncan*, the trial court considered conflicting evidence as to whether Ken's skill, reputation, and guidance were largely responsible for

B. *The Trial Court Did Not Abuse Its Discretion in Allowing Ken a 70 Percent Separate Property Carve-out*

Here, in an attempt to divide the marital estate equitably, the trial court valued the Burbank Companies at a time closest to trial (§ 2552, subd. (a)), even though it could have selected an earlier date, such as the date of separation (§ 2552, subd. (b); *Duncan, supra*, 90 Cal.App.4th at p. 625.) However, in doing so, the trial court then divided the property not into two equal separate portions, but pursuant to *Imperato*, recognizing Ken's hard work in increasing the value of the Burbank Companies, but still acknowledging the community nature of the property and ensuring that Haley received some compensation for the value of the companies. (*Sukoff v. Lemkin* (1988) 202 Cal.App.3d 740, 747 & fn. 7.) The trial court's actions were proper and equitable under the circumstances.

As the overwhelming evidence showed, Ken largely was responsible for the success of the Burbank Companies after separation. At the time the parties separated, the Burbank Companies were worthless. Nevertheless, Ken continued to work at the Burbank Companies, striving to make them succeed. He was involved in virtually every technical decision; he was involved in discussions with acoustic consultants; he reviewed many engineering reports; he handled problems with unsuccessful projects; and he approved all budgetary items. Walter H. Johnson of ABS testified that Ken was "deeply involved" in the decisions of ABS. And, as Harold A. Katersky, a business valuation expert, testified, "[b]ut for the talent, expertise, and efforts of [Ken], the Burbank Companies would have gone out of business soon after the parties' separation." Ken had the unique blend of "sophisticated technical as well as management expertise, combined with an understanding of the law . . . regarding hushkits, combined with the ability to negotiate with and fend off creditors" and the ability to implement a marketing and

---

the Burbank Companies' increased value. "Because the facts were disputed, the proper standard of review is abuse of discretion." (*Ibid*.)

financing strategy to achieve success. In sum, the increase in value in the Burbank Companies (from zero at the time of separation to $20 million at the time closest to trial) was attributable, in large part, to Ken's efforts and abilities, as opposed to simple increases in corporate earnings as a result of capital and market factors. (*In re Marriage of Hargrave* (1985) 163 Cal.App.3d 346, 355; *Logan v. Forster* (1952) 114 Cal.App.2d 587, 601.)

For this reason, Haley's reliance upon *In re Marriage of Aufmuth* (1979) 89 Cal.App.3d 446, 463-465 is misplaced. Unlike the facts in that case, Ken's efforts and expertise herein must be considered a significant factor in the increase in value in the Burbank Companies; there is substantial evidence that the increase in value can be attributed to Ken's efforts and not "primarily attributable to an increase in accounts receivable." (*Id*. at p. 465.) Thus, the trial court acted well within its discretion in finding that good cause existed to allow him a 70 percent separate property carve-out pursuant to *Imperato* for the increased value of the Burbank Companies between the date of separation (July 15, 1992) and the date of valuation (October 31, 1999).

Haley claims that the trial court erred in failing to distinguish between Ken's efforts on behalf of ABS and his efforts on behalf of the Burbank Companies. Because Ken did nothing for ABS, the separate property carve-out for ABS was erroneous. She is mistaken. The trial court noted in its statement of decision Ken's separate efforts and found he contributed to both ABS and the Burbank Companies. Moreover, one of the Burbank Companies, BNC, holds the parties' 37 and one-half percent interest in ABS. There is substantial evidence that if Ken did not keep the Burbank Companies going, the parties would have lost their entire investment in ABS. In other words, Ken's efforts cannot be divided between ABS and the Burbank Companies as neatly as Haley would like.

Haley further alleges that the trial court erred in finding that Ken "saved" the Burbank Companies. Again, she is mistaken. Despite Haley's claims to the contrary, there is substantial evidence that Ken was doing more than just his job. As discussed in

above, there was overwhelming evidence presented at trial that Ken primarily was responsible for the success of the Burbank Companies after the parties separated. Moreover, there is no evidence to support Haley's contention that Ken caused any problems he allegedly cured after the parties separated. Rather, the evidence weighs in favor of the trial court's finding that Ken worked tirelessly at preventing bankruptcy and a total loss for the parties.

To the extent Haley argues that Ken is not entitled to a separate property carve-out because he did not achieve success alone, her position is not compelling. There is no legal authority to support Haley's suggestion. And, it defies logic to require the trial court "to find [that] the *entire* postseparation change in value was due *exclusively* to the personal efforts of the operating spouse in order to apply" *Imperato*. (*Duncan*, *supra*, 90 Cal.App.4th at p. 627.)

C. *Haley's Due Process Rights Were Not Violated*

Haley claims that she did not receive timely notice[11] of Ken's intent to claim a separate property carve-out, a violation of her right to due process. Because Haley did not raise this argument with the trial court, she has waived it. (*California State Auto. Assn. Inter-Ins. Bureau v. Antonelli* (1979) 94 Cal.App.3d 113, 122; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2001) ¶ 1:44, p. 1-8.1 [stating that "ordinarily, issues not raised in the trial court proceedings (or raised but not pursued) are *waived*"].)

Haley argues that she is not foreclosed from raising this new argument because the underlying facts fully were litigated and are undisputed. While this legal premise is

---

**11** The parties dispute when Haley first learned of Ken's claim for more than 50 percent of ownership of the Burbank Companies. Haley contends that she did not learn of his potential claim until 1999. Ken asserts that Haley learned of his *Imperato* claim in June 1998, when attorneys for both parties met to discuss settlement, not to mention his theory that she had constructive knowledge since at least 1994, when she retained counsel to represent her in these proceedings. Regardless, it is undisputed that Ken did not make a claim for a separate property carve-out in 1992, when the petition was filed. The issue presented herein is whether he was required to do so.

correct (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2001) ¶ 8:237, p. 8-114), we find it amusing that Haley characterizes the facts herein as undisputed. Quite bluntly, Haley's position is untenable.

Regardless, on the merits, this argument is not persuasive. Essentially, Haley contends that Ken should have given her notice of this claim because she had a reasonable expectation of 50 percent of the marital estate. Her argument is not compelling and not supported by any legal authority.

The cases cited in support of Haley's theory are distinguishable. None holds that a party must give notice of intent to claim more than 50 percent of the marital property, particularly when that claim is based upon a doctrine akin to the separate property carve-out doctrine set forth in *Imperato* and its progeny. *In re Marriage of Goosmann* (1994) 26 Cal.App.4th 838, 845 (citing *In re Marriage of Lippel* (1990) 51 Cal.3d 1160 (*Lippel*)) holds only that a request for child support must be requested by procedurally proper means. There is an established procedure for requesting child support -- checking the appropriate box on the petition for dissolution. (*In re Marriage of Andresen* (1994) 28 Cal.App.4th 873, 878-879 (*Andresen*).) In other words, to satisfy due process requirements in connection with a request for child support, the appropriate box must be checked on the petition for dissolution.

This holding cannot be expanded to support the proposition urged by Haley. As stated in *Andresen*, "we find nothing in the language of *Lippel* which compels a conclusion that the amount of the relief requested, as contrasted with the type of the relief requested, must be inserted in the relevant form if the form does not itself expressly demand such data." (*Andresen*, *supra*, 28 Cal.App.4th at p. 879; see also Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2001) ¶ 8:929, p. 8 (stating: "There is no requirement that the initial pleadings allege values or that they propose or request a particular manner of division. Even in a default case, due process is satisfied so long as respondent receives adequate notice that petitioner is seeking a division of the property and liabilities identified in the petition. That information itself puts respondent

on notice the court will undertake to assess the community estate, exercising its broad discretion to determine the manner in which the property should be awarded in order to accomplish an equal allocation.") It follows that Ken's checking of the box for "property rights [to] be determined" was sufficient to put Haley on notice of his claims. Nothing more was required, for purposes of due process.

D. *Haley's Claim That Ken's Fiduciary Duties Bar Application of the Separate Property Carve-out Doctrine Lacks Merit*

Haley argues that Ken violated his fiduciary duties to her by failing to disclose his separate property carve-out claim and its effect on the valuation of the community assets. Haley did not raise this argument with the trial court. Accordingly, she has waived it. (*California State Auto. Assn. Inter-Ins. Bureau v. Antonelli*, *supra*, 94 Cal.App.3d at p. 122; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2001) ¶ 1:44, p. 1-8.1.) Moreover, as discussed in section II.C., *ante*, we reject Haley's claim that she can pursue this theory because the underlying facts are undisputed.

Regardless, on the merits, this argument fails. There is no legal authority to support this novel argument. The statutes and cases cited in Haley's opening brief are distinguishable.

Section 1100, subdivision (e) provides: "Each spouse shall act with respect to the other spouse in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence as specified in Section 721, until such time as the assets and liabilities have been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide equal access to all information, records, and books that pertain to the value and character of those assets and debts, upon request." Section 721, subdivision (b), upon which section 1100, subdivision (e), relies for the

definition of the scope of spousal fiduciary duty provides, in relevant part, "a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, . . ."

In reviewing the trial court's finding that Ken did not breach any fiduciary duties owed to Haley, we apply the substantial evidence rule. (*Duffy, supra,* 91 Cal.App.4th at p. 931.)

Section 2105 requires a spouse to prepare a final declaration of disclosure regarding "all assets that are contended to be community or in which it is contended the community has an interest." (§ 2105, subd. (b)(2).) This is a fiduciary obligation. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2001) ¶¶ 8:1350, 8:1352, 8:1352.1, pp. 89-90.) Ken timely complied with the requirements of section 2105. He filed and served a declaration attesting that the value of the Burbank Companies at the time of separation was zero, detailing his personal endeavors to increase the value of the Burbank Companies, and requesting that his postseparation efforts be determined to be his separate property.

Haley suggests that sections 1100 and 721 obliterated *Imperato*. There is no legal authority to support this claim. As the Law Revision Commission Comment to section 1100 provides, section 1100 "continues former Civil Code Section 5125, without change." (Cal. Law Revision Com. com., 29C West's Ann. Fam. Code (1994 ed.) foll. § 1100, p. 361.) Civil Code section 5125 was enacted in 1969, before *Imperato* was decided. If the Legislature had intended to eradicate *Imperato,* it could have done so

when it enacted section 1100.[12] Likewise, there is nothing in the legislative history of section 1100 which indicates that *Imperato* should not be utilized to achieve equitable results when dividing a marital estate.

In fact, in light of the recent amendment to section 2552, as set forth in the legislative history of the statute (*Review of Selected 1976 California Legislation* (1977) 8 Pacific L.J. 315, 322) and as explained in *Duncan*, it appears that the sound reasoning of *Imperato* remains strong: a party may assert an *Imperato* claim in order to recover his or her separate "earnings" after separation when that spouse has contributed his or her separate efforts to the increased value of the community business enterprise.[13]

In her reply brief, Haley argues for the first time that Ken's conduct amounted to constructive fraud. (*In re Marriage of Frick* (1986) 181 Cal.App.3d 997, 1019-1020.) We cannot consider this belatedly raised argument. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [stating that "points raised in the reply brief for the first time will not be considered"].)

---

**12** Similarly, section 721 "continues former Civil Code Section 5103 without [substantive] change." (Cal. Law Revision Com. com., 29C West's Ann. Fam. Code (1994 ed.) foll. § 721, p. 181.) Civil Code section 5103 also was enacted in 1969.

**13** We do not find persuasive Ken's contention that Haley was required to request information regarding any separate property claim he had in the Burbank Companies in order to give rise to a breach of fiduciary claim. *Duffy*, *supra*, 91 Cal.App.4th at pages 932-933 does not so hold. All *Duffy* holds is that with respect to the investment of particular assets, a spouse is required to present evidence either that she asked questions about those assets or that the fiduciary spouse refused to provide information. (*Ibid*.) Nothing in *Duffy* can be construed to hold that a spouse is required to ask questions about the nature of a particular community asset, i.e., whether a spouse intends to assert an *Imperato* claim.

E. *Substantial Evidence Supports the Trial Court's Finding of Alter Ego*

Haley argues that the trial court erred in applying the *Imperato* doctrine because there is no evidence that the parties treated the Burbank Companies as their alter egos, a requirement of *Imperato*. She is wrong.

There is ample evidence to support the trial court's finding that Ken and Haley treated the Burbank Companies as their alter egos. As in *Schoenberg v. Romike Properties* (1967) 251 Cal.App.2d 154, 165-167, Ken and Haley were the sole stockholders of the Burbank Companies and frequently wrote checks (or instructed the Burbank Companies' employees to write checks on their behalf) for their personal expenses from the corporations' bank account. They used the Burbank Companies' bank account while they were residing together in the Encino residence. Even after the parties separated, Haley used the Burbank Companies' bank account to pay personal expenses, including a payment to Santa Barbara Title in connection with her purchase of the Santa Barbara property. And, even if characterized as a protest to Ken's conduct, Haley acknowledged that Ken "had been operating the [Burbank] Companies much as a sole proprietorship without Board of Directors' approval for major corporate decisions which would otherwise be the province of the Board of Directors," thereby conceding that he was not respecting the corporate form of the Burbank Companies.

Because there is ample evidence to support the trial court's finding that the parties treated the Burbank Companies as their alter egos, the trial court properly pierced the corporate veil and applied *Imperato* to the increased value of the Burbank Companies.

F. *The Trial Court Properly Valued the Burbank Companies*

The trial court valued the Burbank Companies at zero on July 15, 1992, and at $20 million at trial. Haley contends that these valuations were erroneous. We disagree.

"Under [Family Code] section 2550, the [trial] court must divide the community estate of the parties equally. In this regard, the court has broad discretion to determine the manner in which community property is divided and the responsibility to fix the value of assets and liabilities in order to accomplish an equal division." (*Duncan, supra*,

90 Cal.App.4th at p. 631.) "The trial court's determination of the value of a particular asset is a factual one and as long as that determination is within the range of the evidence presented, we will uphold it on appeal." (*Id*. at p. 632.) "In the exercise of its broad discretion, the trial court 'makes an independent determination of value based upon the evidence presented on the factors to be considered and the weight given to each. The trial court is not required to accept the opinion of any expert as to the value of an asset.' [Citations.] Differences between the experts' opinions go to the weight of the evidence. [Citations.] Rather, the court must determine which of the recognized valuation approaches will most effectively achieve substantial justice between the parties." (*Ibid*.)

1. *The Trial Court Applied the Proper Valuation Standard*

Haley objects to the trial court's methodology in valuing the Burbank Companies. Her argument is not well-taken.

It is undisputed that the Burbank Companies were closely held. Determining the value of "infrequently sold, unlisted, closely held stock is a difficult legal problem. Most of the cases illustrate there is no one applicable formula that may be properly applied to the myriad factual situations calling for a valuation of closely held stock. [Citation.] It is, therefore, incumbent upon a court faced with such a problem to review each factor that might have a bearing upon the worth of the corporation and hence upon the value of the shares. Unless there is some statutory or decisional proscription on their use, the factors listed in Revenue Ruling 59-60 . . . should be consulted and used to evaluate closely held stock." (*In re Marriage of Hewitson* (1983) 142 Cal.App.3d 874, 888 (*Hewitson*).)

"Internal Revenue Code section 2031 provides a statutory guide to the evaluation of stock in a closely held corporation. It states that the value of closely held stock and securities 'shall be determined by taking into consideration, in addition to all other factors, the value of stock or securities of corporations engaged in the same or a similar line of business which are listed on an exchange.'" (*Hewitson, supra*, 142 Cal.App.3d at pp. 882-883.)

As a consequence of this statutory directive, the Internal Revenue Service promulgated Revenue Ruling 59-60, which lists eight factors to consider in valuing shares of closely held stock. These factors are: "(a) The nature of the business and the history of the enterprise from its inception. [¶] (b) The economic outlook in general and the condition and outlook of the specific industry in particular. [¶] (c) The book value of the stock and the financial condition of the business. [¶] (d) The earning capacity of the company. [¶] (e) The dividend-paying capacity. [¶] (f) Whether or not the enterprise has goodwill or other intangible value. [¶] (g) Sales of the stock and the size of the block of stock to be valued. [¶] (h) The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter." (Rev. Rul. 59-60, 1959-1 C.B. 237.)

As explained in *Ronald v. 4-C's Electronic Packaging, Inc.* (1985) 168 Cal.App.3d 290, 299, footnote omitted (*Ronald*), there are five valuation approaches, "the combination of which will determine the value of a minority interest in a closely held corporation. These valuation approaches, employing all of the factors of Revenue Ruling 59-60, are adjusted net worth, capitalization of income stream, capitalization of earnings before interest and tax, discounted cash flow, and market comparables. [Citation.]" The *Ronald* court adopted the conclusion of Professors Joseph D. Vinso and Burton H. Marcus that "'[u]sing the five methods outlined here considers all the factors noted in IRS 59-60, which the [*Hewitson*] Court prescribed and good appraisal practice requires. . . . " (*Id*. at p. 300.)

Here, there is substantial evidence to support the trial court's valuation of the Burbank Companies as zero at the date of separation. Relying upon Revenue Ruling 59-60, the trial court accepted the analysis of Ken's expert, Jack Zuckerman (Zuckerman), and rejected that of Haley's experts. Zuckerman utilized two methodologies espoused in *Ronald*: the adjusted net asset approach, a variant of the "adjusted net worth" approach, and capitalization of earnings. Using the adjusted net asset approach, Zuckerman relied upon the financial statements of the Burbank Companies on December 31, 1992, and

determined that the liabilities of the Burbank Companies exceeded the assets. Even with appropriate adjustments, including goodwill, the Burbank Companies did not produce a positive value. Likewise, applying the capitalization of earnings approach reveals that the Burbank Companies were valueless on the date of separation. In light of this evidence, the trial court did not abuse its discretion in accepting the analysis of Zuckerman and finding that the Burbank Companies were valueless on the date of separation.

Haley argues that the trial court erred in refusing to consider the investment value of the Burbank Companies on the date of separation. Her position is not compelling. *Hewitson* allows a trial court evaluating shares of a closely held corporation to rely upon either the investment value or market value approach. (*Hewitson, supra,* 142 Cal.App.3d at p. 887.) While investment value satisfies the mandate of section 2550, *Hewitson* does not hold that the trial court must ascertain the investment value of a closely held corporation in order to satisfy the statutory requirements. Moreover, the trial court was not required to accept her experts' analysis and, for the reasons noted above, did not abuse its discretion in refusing to do so. (*Duncan*, *supra*, 90 Cal.App.4th at p. 632; *In re Marriage of Hargrave*, *supra*, 163 Cal.App.3d at p. 353 [holding that "a judge is not bound to accept the testimony of any witness"].) In short, the trial court did not err.

Haley contends that the trial court's error is implicit in light of certain comments made during the course of the valuation proceedings. This argument is not persuasive. Informal remarks made from the bench during trial cannot be used to upset findings later made which contain the decision in the case, particularly when the decision is supported by well-reasoned legal and factual analysis. (*In re Marriage of Green* (1989) 213 Cal.App.3d 14, 20; *Muther v. Muther* (1963) 212 Cal.App.2d 778, 781.)

2. *The Trial Court Properly Rejected Haley's Hindsight Evidence*

There is no legal authority to support Haley's contention that the trial court erred in rejecting her expert's use of "hindsight" to value the Burbank Companies on the date of separation. Nothing in section 2552 requires the court to consider expert testimony

based upon hindsight. In fact, as noted above, the trial court was free to weigh the competing testimony of the parties' experts and conclude that Ken's expert's analysis was appropriate. And, to the extent Haley's expert's "hindsight" approach included Ken's postseparation efforts, the trial court properly concluded that the expert erred. (*In re Marriage of Rives* (1982) 130 Cal.App.3d 138, 150 [stating that "community property interests may be acquired only during the marriage and it would be inconsistent with that philosophy to assign value to the postmarital efforts of either spouse"].)

3. *The Trial Court Did Not Err in Adopting the Historical Earnings Approach*

Haley contends that the trial court erred in adopting an "historical earnings" valuation approach. There is no legal authority to support Haley's terse argument. As noted above, the trial court expressly followed *Hewitson* and adopted Zuckerman's proper analysis in doing so. Nothing in *Hewitson* contradicts the trial court's valuation.

4. *The Trial Court Did Not Err in Refusing to Retain Jurisdiction*

Haley argues that the trial court erred in refusing to retain jurisdiction for a reasonable time (no more than two years) and value the Burbank Companies at a future date. We disagree.

Section 2550 mandates that in a dissolution proceeding, the trial court shall divide the community estate in its judgment of dissolution "or at a later time if it expressly reserves jurisdiction to make such a property division." (§ 2550.) If the trial court is without requisite evidence regarding the value of particular property, it is appropriate for the court to retain jurisdiction to value the asset at a later date. (*In re Marriage of Kilbourne* (1991) 232 Cal.App.3d 1518, 1525; *In re Marriage of Hargrave*, *supra*, 163 Cal.App.3d at p. 355.) We review the trial court's decision to refuse to retain jurisdiction for abuse of discretion. (*In re Marriage of Munguia* (1983) 146 Cal.App.3d 853, 858-859.)

The trial court properly refused to reserve jurisdiction and value the Burbank Companies at a later date because it possessed ample evidence of their value. As

discussed above, the trial court found credible the expert testimony of Zuckerman and Zuckerman's appraisal reports. Zuckerman valued the Burbank Companies at between $16.1 million and $21.7 million as of September 30, 1999. That evidence alone was sufficient for the trial court to value the Burbank Companies. Nevertheless, the court also considered the expert testimony from Haley's expert, who valued the Burbank Companies at approximately $22 million on August 31, 1999. Quite simply, there was no need for the trial court to reserve jurisdiction and value the Burbank Companies at a later date. Against the backdrop of Revenue Ruling 59-60, the trial court weighed the expert reports and determined the value of the Burbank Companies to be $20 million on October 31, 1999 (the date close to trial). Accordingly, the trial court did not abuse its discretion in refusing to retain jurisdiction and opting to value the Burbank Companies at the time of trial.

G. *The Trial Court Properly Applied Pereira*

Haley contends that the trial court erred in its application of *Pereira v. Pereira* (1909) 156 Cal. 1 (*Pereira*). When employing the *Imperato* doctrine, the conflicting formulas of apportionment as set forth in *Pereira, supra*, 156 Cal. at page 7 and *Van Camp v. Van Camp* (1921) 53 Cal.App. 17, 27-28 (*Van Camp*) are applied in reverse. (*In re Marriage of Barnert, supra*, 85 Cal.App.3d at p. 423.) "That is, once a business is started by one spouse as community property during the marriage, and that spouse continues working at that business after separation, the court must use whichever formula it deems appropriate. If the court chooses the *Pereira* approach, it 'would allocate a fair return of the increase to the community property and the excess would be husband's separate property.' ([*In re Marriage of Imperato* (1975)] 45 Cal.App.3d [432 ,] 439.) If the court chooses the *Van Camp* approach, it 'would determine the reasonable value of husband's services (less the draws or salary taken) and allocate this additional sum, if any, to husband as his separate property and the balance of the increase to community property.' ([*In re Marriage of Imperato, supra*,] 45 Cal.App.3d at p. 439.)" (*In re Marriage of Barnert, supra*, 85 Cal.App.3d at p. 423.)

Substantial evidence support the trial court's application of *Pereira* herein. As discussed, there is ample evidence of Ken's significant contributions to the Burbank Companies. His perseverance and skills principally contributed to the success of ABS and the Burbank Companies after the parties separated. In fact, Haley benefited as a result of his efforts. While the parties were separated and Ken was working at the Burbank Companies, Haley received more than $56 million in distributions, monies the trial court determined she could retain even though she was overpaid by more than $36 million because those monies were Ken's separate property. There is no merit whatsoever to the argument that her share of the community property was "effectively forfeit[ed]."

Haley contends that the trial court erred in applying *Pereira* because the Burbank Companies were capital intensive; they did not increase in value largely because of Ken's efforts. This argument is not persuasive. At the risk of sounding repetitive, there is substantial evidence that the increase in the Burbank Companies resulted from Ken's personal abilities and guidance, not from any capital intensity.

Finally, Haley claims that if a separate property carve-out is appropriate, the trial court should have applied *Van Camp*, not *Pereira*. We disagree. The trial court did not abuse its discretion in applying *Pereira* to the facts of this case. Regardless, even if the trial court had erred, that error would have been harmless. There is substantial evidence that the drastic turnaround in the financial success of ABS and the Burbank Companies essentially was the result of Ken's capabilities, efforts, and perseverance. Ken was entitled to far more than the salary he drew while working after the parties separated. There is ample evidence that the reasonable value of Ken's services, less salary taken, equals the amount of money awarded to Ken by virtue of the separate property carve-out. It follows that there is no error in awarding him 70 percent of the increased value of the Burbank Companies.

III. *Although the Trial Court Did Not Err in Dissolving the 707 Partnership, It Did Commit Reversible Error in Failing to Credit Haley with Her Share of the Value of the New Hushkit Venture's Use of the 707 Partnership Assets*

The trial court found that the parties entered into an oral partnership agreement regarding the Original Hushkit Venture. One of the terms of the agreement was that Haley agreed to permit the use of funds received from ABS distributions to fund the operational and research and development costs with respect to the Original Hushkit Venture. At the hearing on April 15, 1999, Haley stated that she did not want to continue to permit the use of ABS distributions to fund operational and research and development costs with respect to the Original Hushkit Venture. By electing not to continue with one of the key terms of the partnership agreement, Haley effectively dissolved the Original Hushkit Venture.[14]

Haley places much emphasis on the fact that she withdrew her request at oral argument for direct distribution of ABS profits to her in subsequent briefs filed with the trial court, stating that she never intended to terminate the 707 partnership by halting her ABS distributions to the Original Hushkit Venture. We note that despite Haley's claim to the contrary, the trial court expressly considered Haley's arguments advanced in the posthearing briefs, in which she specifically recanted her request that her share of ABS distributions not be used to fund the Original Hushkit Venture. As a result, the trial court was faced, once again, with Haley's inconsistent "position with respect to wanting to remain as a participant in the 707 hushkit venture." The trial court was free to disregard her contradictory testimony, which changed "apparently based on her and her advisor's perception of the possibility of gains or losses," and conclude that Haley did not want to

---

**14** To the extent the trial court concluded that Haley "terminated" the partnership, it erred. A "partnership is terminated when the winding up of its business is completed." (Corp. Code, § 16802, subd. (a).) Here, the winding up of the partnership business never occurred, and thus no termination was effected. That being said, substantial evidence supports our finding that Haley's election "dissolved" the partnership, leaving it to be wound up and then terminated.

continue to permit the use of ABS distributions to fund operational and research and development costs with respect to the Original Hushkit Venture.

In other words, substantial evidence supports the finding that Haley elected to dissolve the oral partnership created for the purpose of funding the Original Hushkit Venture.

Having determined that Haley elected to dissolve the partnership, the partnership needed to be wound up, pursuant to Corporations Code sections 16801 and 16802, and then terminated. In fact, because Ken elected to establish a New Hushkit Venture, without Haley's participation, he was required to "adequately account for the operations of the New Hushkit Venture, having in mind that his use of the tangible and intangible assets of the Old Hushkit Venture will be the same as a fiduciary and as a remaining partner 'in possession' in the winding up and dissolution of a partnership." Here, the Original Hushkit Venture partnership never was wound up. Moreover, there is no indication that Ken accounted for the community's contributions to the operations of the New Hushkit Venture, contributions for which Haley might be entitled to credit.

Accordingly, we remand the following issue to the trial court for further findings consistent with this opinion: the trial court should determine the community contribution to the New Hushkit Venture based upon its contribution to the Original Hushkit Venture and credit Haley accordingly.

In his responding brief, Ken argues that this entire issue is moot because Haley remained a participant in the 707 Partnership as a shareholder of BAC II, and because BAC II filed bankruptcy on April 10, 2001, the assets of the 707 program are now part of the bankruptcy estate. This argument is incomplete and not compelling. The trial court did not conclude that Haley remained a participant in the 707 Partnership as a shareholder of BAC II; in fact, it expressly concluded otherwise, namely that Ken and Haley were partners in the Original Hushkit Venture. If the 707 Partnership is worthless and/or within the jurisdiction of the bankruptcy court, the trial court may consider this fact when determining Haley's credit, if any, in the remanded proceedings.

IV. *The Trial Court Did Not Err in Finding That Ken Did Not Breach His Fiduciary Duties to Haley in Connection with the 707 Partnership and the Burbank Companies*

A. *Standard of Review*

Sections 1100 and 721, quoted in relevant part, *ante*, set forth the fiduciary duties between spouses. In reviewing the trial court's finding that Ken did not breach any fiduciary duties to Haley, we apply the substantial evidence rule. (*Duffy*, *supra*, 91 Cal.App.4th at p. 931.)

B. *Ken Did Not Breach Any Fiduciary Duties*

Haley contends that Ken breached his fiduciary duties by failing to disclose information Haley requested from him. There is ample evidence to support the trial court's conclusion to the contrary, namely that Ken provided Haley and her personal accountant, Gregory M. Maher (Maher), with all information they requested. Moreover, the trial court properly considered the fact that Haley never examined Maher at trial regarding her claim of lack of information, notwithstanding the fact that he frequently was available and testified on more than one occasion. (Evid. Code, §§ 412, 413.)

Haley also argues that Ken breached his fiduciary duties by engaging in an imprudent investment, namely the 707 Partnership. There are several problems with her theory. First, to the extent her theory is based upon the testimony of her three aeronautical experts, the trial court had the discretion to disregard their testimony. (*Duncan*, *supra*, 90 Cal.App.4th at p. 631.) Second, "a spouse generally is not bound by the prudent investor rule and does not owe to the other spouse the duty of care one business partner owes to another." (*Duffy*, *supra*, 91 Cal.App.4th at p. 940.) Thus, Ken did not owe Haley a duty of care to invest prudently.

In any event, Ken gave Haley the opportunity to get out of the 707 Partnership by buying her out and returning her entire investment. She rejected his offer. Thus, to the extent Haley believed that Ken was mismanaging the Burbank Companies, she could have obtained a full return on her investment in the 707 Partnership which would have

resolved any concerns she had about the prudence of Ken's investment. She refused that opportunity.

Finally, the trial court discredited virtually all of Haley's testimony regarding this cause of action, finding her position changes "as the wind bends the bow of a tree" and assessing her as "so opportunistic, it has affected her credibility about her complaints regarding [Ken's] management decisions." We cannot reweigh Haley's testimony or judge her credibility. (*In re Marriage of Dick*, *supra*, 15 Cal.App.4th at p. 160.) In sum, substantial evidence supports the trial court's determination that Ken did not breach any fiduciary duties to Haley.

V. *The Trial Court Properly Divided All Community Property and Properly Considered Immediate and Specific Tax Consequences to the Parties*

A. *The Trial Court Properly Divided the Community Assets*

There is no merit to Haley's complaint that the trial court did not divide all community assets equally. As reflected in the trial court's statement of decision, Haley was credited for 50 percent of the community interest (30 percent) of the value of the Burbank Companies ($20 million). The statement of decision specifically provides that Haley is entitled to $19 million, which includes her half of the 30 percent of the $20 million. Her complaints regarding her share of the partnership are addressed in section III, *ante*.

B. *Because Haley Did Not Present Evidence of an Immediate and Specific Tax Consequence, the Trial Court Did Not Err*

Haley claims that the trial court erred in failing to consider her immediate and specific tax consequences. Her contention is faulty. "It is now decisional law that the trial court shall consider the tax consequences when dividing community property when there is proof of an *immediate* and *specific* tax liability." (*In re Marriage of Clark* (1978) 80 Cal.App.3d 417, 422.) Evidence of a speculative tax liability is insufficient. (*Id*. at p. 423.)

Haley's argument fails because she does not present any evidence of an immediate and specific tax liability. The only evidence she introduced consisted of a "projected" 1999 tax return, which expressly was labeled "FOR CALCULATION PURPOSES ONLY TO SUPPORT EXHIBIT 733B REVISED" and Maher's testimony regarding estimated or projected taxes. This speculative evidence was insufficient and provided the trial court with no grounds to consider Haley's alleged immediate and specific tax consequences. We note, as well, that Haley's reply brief is silent on the issue of taxes.[15]

VI. *The Trial Court's Child and Spousal Support Orders Are Proper*

*A. The Trial Court Properly Denied Haley Child Support*

We review the court's determination of child support for abuse of discretion. (*In re Marriage of Chandler* (1997) 60 Cal.App.4th 124, 128 (*Chandler*).) "'[T]he court in child support proceedings, to the extent permitted by the child support statutes, must be permitted to exercise the broadest possible discretion in order to achieve equity and fairness in these most sensitive and emotional cases. . . .' [Citation.]" (*In re Marriage of Lusby* (1998) 64 Cal.App.4th 459, 471 (*Lusby*).) The trial court's order will be upheld on appeal unless an abuse of discretion is demonstrated. (*Id*. at p. 472; see also *In re Marriage of Catalano* (1988) 204 Cal.App.3d 543, 553 [holding: "The amount of child support rests in the discretion of the trial court and cannot be overturned unless a clear abuse is shown. An appellate court does not substitute its own judgment; rather, it interferes only if no judge could reasonably have made the order under the circumstances."].) We review challenges to the trial court's factual findings for the existence of substantial evidence to support those findings. (*Chandler, supra*, at p. 128.) We examine the evidence in the light most favorable to the prevailing party, giving that

---

**15** It should be noted that the trial court expressly considered the issue of taxes when it awarded Haley, as her separate property, the distributions from the Burbank Companies she received after separation, which, pursuant to *Imperato*, actually belonged to Ken, but Haley was entitled to retain because Ken was estopped from seeking reimbursement.

party the benefit of every reasonable inference, accepting all evidence favorable to that party as true, and discarding any contrary evidence. (*Lusby*, *supra*, at p. 472.)

Here, the trial court did not abuse its discretion in expressly considering the equities at issue by denying Haley's request for child support. Her five arguments, each of which is embodied in a one-sentence bullet point, do not justify reversal.

First, Haley contends that Ken's silence when she testified on October 14, 1993, that she was receiving child support constitutes a judicial admission that she had the right to and was receiving child support. We disagree.

It is undisputed that at the October 14, 1993, hearing, Haley stated that she was receiving child and spousal support and Ken failed to dispute her representation. After reading the transcript from the hearing, we doubt whether Ken's silence under these circumstances constitutes a judicial admission. Ken explained at trial that he was silent because no question regarding child support was posed to him and he recalled that Commissioner Fried "wanted [him] to be silent whenever she was asking questions of the respondent." Regardless, if her statement and his corresponding silence are construed as a judicial admission, the fact that Haley may have been receiving child support does not compel the conclusion that she was entitled to it. And, there is no evidence of any agreement for child support consistent with the alleged judicial admission. As the trial court found, Haley's testimony regarding an agreement for child support was not credible.

Second, Haley contends the trial court erred in refusing to apply section 4009 and award her child support retroactive to the date Ken filed the petition for dissolution. Haley is mistaken. The trial court had no jurisdiction under section 4009 to award child support retroactive to any date prior to the filing of the order to show cause (October 27, 1998). (*In re Marriage of Goosmann*, *supra*, 26 Cal.App.4th at p. 843.)

While section 4009 was amended effective January 1, 2000, to provide, in relevant part, that "an original order for child support may be made retroactive to the date of filing the petition," there is no legal authority presented to support Haley's proposition that said

amendment could or should be applied retroactively in this case. In fact, there is overwhelming legal authority which holds that statutes operate prospectively unless they expressly provide otherwise. (*In re Marriage of Reuling* (1994) 23 Cal.App.4th 1428, 1439.)

Even if section 4009 did apply, the statute is permissive ("*may* be made retroactive"), not mandatory (§ 12, italics added), and the record is replete with evidence to support the trial court's indication that it would have declined to exercise its discretion to apply the statute in this case.

Third, Haley contends that the trial court misconstrued the language of the parties' stipulation. On November 17, 1998, the parties stipulated that the order to show cause for child support submitted to Judge Olson "shall be deemed issued as of October 27, 1998 and the Court shall have jurisdiction to issue orders in connection with the OSC retroactive to October 27, 1998." The trial court properly concluded that the terms of the stipulation granted it jurisdiction to order child support payments retroactive to October 27, 1998, only. There is no factual basis for the expansion of the terms of the stipulation. Haley presented no evidence to support her claim that the stipulation was intended to confer jurisdiction upon the trial court to order child support to a date prior to October 27, 1998.

Likewise, there is no legal authority to support Haley's contention. *City of Ukiah v. Fones* (1966) 64 Cal.2d 104 (*Fones*) is inapposite. In *Fones*, the Supreme Court considered "whether a stipulation entered into by a discharged civil service employee, stating that if his discharge was wrongful he was entitled to back salary for the period prior to the filing of the complaint, may be deemed a waiver by him of all wages to which he would have been entitled for the period subsequent to that date until reinstatement or retirement." (*Id*. at p. 106.) The court concluded that there was no waiver; absent express evidence of waiver, the "well settled rule that a civil service employee who has been unlawfully deprived of his position is entitled to recover the full amount of the

salary which accrued to him from the date of his unlawful discharge *to the date of his reinstatement*" applies. (*Id*. at p. 107.)

In the present case, the parties' stipulation has no bearing upon any well-settled rule entitling a party to child support prior to any date other than the first order to show cause for child support. In fact, as set forth above, the applicable law provides otherwise: child support only may be ordered retroactively to the date of the first order to show cause. (*In re Marriage of Goosmann*, *supra*, 26 Cal.App.4th at p. 843.) Moreover, the terms of the stipulation are clear -- the trial court had jurisdiction to issue orders regarding child support retroactive to October 27, 1998, only. No contrary extrinsic evidence exists. And, the *Fones* court held that the stipulation did not prohibit wages to which the employee would have been entitled *after* the date of the stipulation (*Fones*, *supra*, 64 Cal.2d at pp. 107-108); likewise, the parties' stipulation herein gave the trial court jurisdiction to consider child support from October 27, 1998, forward. Nothing in *Fones* can be construed to mean that the stipulation therein allowed for wages prior to the date of said stipulation. It follows that *Fones* cannot be so interpreted to accept Haley's proposition.

Fourth, to the extent Haley contends that the trial court erred in denying her child support based upon its erroneous conclusion that Ken was entitled to a separate property carve-out, her position cannot be sustained. As set forth above, the trial court correctly found that Ken was entitled to a separate property carve-out and that Haley was overpaid during the years these proceedings were pending. Given the millions of dollars she was paid (money that the trial court found belonged to Ken), the trial court did not abuse its discretion in finding that Haley should have used those monies to support the children "in a lavish life style."

Fifth, Haley contends that the trial court erred in ignoring evidence of an agreement between Ken and Haley that Ken would reimburse her for half of the children's expenses. Substantial evidence supports the trial court's conclusion that no agreement was reached between the parties for child support. Ken testified that the

parties had not reached an agreement. Haley's testimony regarding an alleged agreement for child support was inconsistent and not credible. Likewise, her reliance upon a July 28, 1997, letter from her accountant, Maher, to Ken regarding the alleged agreement for child support is insufficient in light of Ken's testimony that he rejected the terms set forth in that letter. Quite simply, the trial court believed Ken and not Haley. Accordingly, the trial court did not err in denying Haley's request for child support.

B. *The Trial Court Properly Denied Haley Spousal Support*

Haley does not challenge the trial court's denial of spousal support to her; she only objects to the trial court's refusal to reserve jurisdiction over this issue. The trial court may decline to order spousal support and may refuse to retain jurisdiction over this issue. (§ 4336, subd. (a); *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 453 (*Morrison*).) The trial court's order is reviewed for abuse of discretion. (*In re Marriage of Christie* (1994) 28 Cal.App.4th 849, 856 (*Christie*); see also *Morrison*, *supra*, at p. 454; *In re Marriage of Wilson* (1988) 201 Cal.App.3d 913, 915.) "The appropriate guideline by which the court's discretion is tested is to be found in [Family Code section 4320]." (*Christie*, *supra*, at pp. 856-857, fn. omitted.) The trial court must consider the totality of circumstances and weigh the factors set forth in section 4320 before terminating jurisdiction. (*In re Marriage of Wilson*, *supra*, at p. 920.)

Here, the trial court did not abuse its discretion in refusing to retain jurisdiction over the issue of spousal support. The trial court carefully balanced the evidence and considered each of the factors identified in section 4320, including: (1) the parties' standard of living (§ 4320, subd. (a)), (2) Ken's ability to pay counterbalanced by his future serious financial problems (§ 4320, subds. (c), (j)), (3) the assets and liabilities of the parties (§ 4320, subd. (e)), (4) Haley's marketable skills (§ 4320, subd. (a)(1)), (5) the fact that Haley did not contend that her earning capacity has been impaired by any domestic duties (§ 4320, subd. (a)(2)), (6) the fact that Haley did not contribute to Ken's attainment of any education, training, career position, or license (§ 4320, subd. (b)), (7) the parties' equal income tax obligations (§ 4320, subd. (i)), (8) the duration of the

marriage (§ 4320, subd. (f)), (9) Haley's age and health (§ 4320, subd. (h)), and (10) the fact that Haley is self-supporting, one of several equitable factors considered by the trial court (§ 4320, subd. (j)). There is ample evidence to support the trial court's decision that "it would be grossly inequitable to retain jurisdiction for an award of spousal support in this case," and Haley directs us to no evidence which refutes the conclusions of the trial court. Balancing the equities, under these circumstances, the trial court's decision was proper. (*Christie, supra*, 28 Cal.App.4th at p. 861.)

***Ken's Cross-Appeal***

I. *The Trial Court Did Not Err in Finding That Haley Proved Estoppel*

As discussed above, the trial court concluded that the total assets of the parties at the time of trial was approximately $130 million. The trial court awarded Ken 70 percent of the postseparation distributions from the Burbank Companies pursuant to *Imperato*, and then divided the remaining 30 percent equally between the parties. As a result, Ken was entitled to approximately $91 million (70 percent), plus 50 percent of the remaining $39 million. Haley was entitled to the 50 percent of the remaining $39 million, or about $19 million.

However, between the date of separation and the date of trial, Haley actually received about $56 million of postseparation distributions from the Burbank Companies. In other words, she received about $36 million more than her 50 percent share of the community property. Thus, the issue arose as to whether she was required to reimburse Ken for the monies he inadvertently overpaid to her or whether she was entitled to keep them. The trial court concluded that Ken was "estopped to complain and shall not have the right to be reimbursed by [Haley] for any of such . . . funds distributed to [her] because [Ken] waited so long to resolve a division of the community property by agreement or judicial action." Ken appeals from that portion of the trial court's decision.

"The elements of estoppel are representation or promise; made with knowledge of the facts; to a party ignorant of the truth; with the intent that the other party act on it; when the other party has, in fact been induced to rely on it." (*In re Marriage of Recknor*

(1982) 138 Cal.App.3d 539, 546; see also section I.E., *ante*.) It is an equitable doctrine, designed "to prevent a person from asserting a right where his conduct or silence makes it unconscionable for him to assert it." (*In re Marriage of Recknor, supra*, at p. 546.) "Generally, the determination of . . . estoppel is a question of fact, and the trier of fact's finding is binding on the appellate court. [Citations.] When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319.)

"Although the distinction between courts of equity and courts of law has become somewhat blurred in current practice, family law courts have traditionally been regarded as courts of equity." (*In re Marriage of Fogarty & Rasbeary* (2000) 78 Cal.App.4th 1353, 1360.) In reviewing a decision from family court, we cannot ignore "the overall equity of a result that allows a trial court to do what is fair under the unique factual circumstances of each case." (*Id*. at p. 1363.)

With these principles in mind, we find that the trial court's decision should be upheld. It is undisputed, as the trial court acknowledged, that both parties had an equal opportunity to request a trial in this case; the multiyear delay between the date Ken filed his petition and the date this case ultimately went to trial was caused by both parties. It follows that, at any time, Ken could have instituted the proceedings to divide the community property. He could have sought a division of the community property such that the entirety of his postseparation efforts would have been his alone, with no postseparation payments to Haley. He did not do so. Instead, the status quo remained steadfast, with Ken making large distributions to Haley over the years, until the parties decided to proceed with a trial for division of community assets. The trial court's decision that he is not entitled to reimbursement was the direct result of Ken's inaction. It simply would be inequitable, under the factual circumstances of this case, to require Haley to reimburse Ken the millions of dollars he paid her while he did not even attempt to seek division of the marital estate.

Within this section of his cross-appeal, Ken argues that the judgment must be corrected for various reasons. We agree in limited part. The trial court awarded Ken only six percent interest on the money judgment in his favor. The statutory rate of interest on a money judgment is 10 percent. (Code Civ. Proc., § 685.010, subd. (a).) Accordingly, the judgment is reversed insofar as the interest rate was too low on the money judgment of $2,706,380.80 in Ken's favor. The remainder of the issues raised by Ken were not adequately briefed in his opening brief, and we sustain Haley's objection that Ken cannot present his arguments in the reply for the first time. (*Reichardt v. Hoffman, supra,* 52 Cal.App.4th at p. 764.)

II. *The Trial Court Did Not Err in Denying Attorney Fees and Costs to Ken Pursuant to Section 271*

A. *Standard of Review*

Section 271 provides, in pertinent part: "(a) Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award."

We consider an order denying sanctions under the abuse of discretion standard of review. (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 178; *In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 82 (*Burgard*).) "'"[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its

order, no judge could reasonably make the order . . . ." [Citations.]' [Citation.]" (*Burgard*, *supra*, at p. 82.)

Ken argues that Haley took unreasonable positions throughout these proceedings, including refusing to stipulate to facts which she allegedly admitted, refusing to agree to bifurcate the Encino residence issue until after Ken incurred costs preparing that issue for trial, litigating matters to the "nth" degree, and rejecting reasonable settlement offers. As evidenced by the thorough statement of decision, the trial court carefully observed the parties and painstakingly evaluated their litigation conduct. Weighing this evidence and considering equitable factors in light of the holdings in *In re Marriage of Daniels* (1993) 19 Cal.App.4th 1102, 1106-1107 and *In re Marriage of Hargrave*, *supra*, 36 Cal.App.4th at pages 1323-1324, the trial court concluded that it was just and reasonable for each party to bear his or her own attorney fees and costs. In essence, the trial court looked at the proceedings in toto, balanced the parties' litigation tactics against their respective financial capabilities, including their individual recoveries in these proceedings, and determined that an award of attorney fees and costs was inappropriate. Under these circumstances, we cannot find that the trial court abused its discretion.

**DISPOSITION**

This matter is remanded to the trial court for valuation of the community contribution to the 707 Partnership and for a determination of whether Haley is entitled to credit for community contributions and, if so, how much of a credit. The judgment is reversed only insofar as the trial court awarded Ken six percent interest on the money judgment; the interest rate should be 10 percent. In all other respects, the judgment of the trial court is affirmed. Each party to bear his or her own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

ASHMANN-GERST, J.

We concur: BOREN, P. J.
NOTT, J.